

SERVED: July 28, 1994

NTSB Order No. EA-4218

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 13th day of July, 1994

_____)	
CHRIS EDEN,)	
)	
Applicant,)	
)	
v.)	
)	Docket 178-EAJA-SE-12967
DAVID R. HINSON,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Applicant has appealed from the initial decision of Chief Administrative Law Judge William E. Fowler, Jr, served August 9, 1993, denying applicant's application for attorney fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. 504.¹ For the reasons that follow, we deny the appeal and affirm the denial of fees and expenses.

¹ A copy of the initial decision is attached.

The EAJA requires the government to pay to a prevailing party certain attorney fees and costs unless the government establishes that its position was substantially justified or that special circumstances would make an award of fees unjust. 5 U.S.C. 504(a)(1). To find that the Administrator was substantially justified we must find his position reasonable in fact and law, i.e., that there is a reasonable basis in truth for the facts alleged; that there is a reasonable basis in law for the legal theory propounded; and that the facts alleged will reasonably support the legal theory advanced. McCrary v. Administrator, 5 NTSB 1235, 1238 (1986); U.S. Jet v. Administrator, NTSB Order No. EA-3817 at 2 (1993). Accordingly, substantial justification may be demonstrated even where charges have been withdrawn or an action has been dismissed. U.S. Jet at 3.

The standard of review at the EAJA stage is "separate and distinct from whatever legal standards governed the merits phase of the case." FEC v. Rose, 806 F.2d 1081, 1087.² In Rose -- a case where fees were denied despite a ruling in the merits phase that the government's action was "arbitrary and capricious" -- the court made clear that, in evaluating the government's actions at the EAJA stage, the adjudicating authority need only find that it "acted slightly more than reasonably, even though not in compliance with substantive legal standards applied at the merits

² See also U.S. Jet v. Administrator, NTSB Order No. EA-3817 at 3 ("EAJA's substantial justification test is less demanding than a party's burden of proof").

phase." Id.

On January 20, 1993, the Administrator issued an order suspending applicant's pilot certificate for 30 days based on his alleged 400-foot deviation from an air traffic control altitude clearance, in violation of 14 C.F.R. 91.123(a). Applicant filed a timely appeal from the order on February 3, 1993. The Administrator, however, did not file the complaint within the five-day period specified in our rules of practice. See 49 C.F.R. 821.31(a) (requiring the Administrator to file the order as the complaint "within 5 days after the notice of appeal has been filed upon the Administrator"). The record does not reflect when the Administrator received applicant's notice of appeal, but there is no suggestion that it was unduly delayed in the mail. Thus, assuming the Administrator received applicant's notice of appeal at approximately the same time as the Board received its copy, or on February 9,³ the complaint should have been served five business days after that, on or about February 15.

On March 26, 1993, applicant filed a motion to dismiss, citing the Administrator's failure to file a complaint or to request an extension of time within which to do so. On April 13, 1993, the Administrator filed a motion to terminate the proceedings, indicating that he was voluntarily withdrawing the order of suspension in light of his admitted failure to file a

³ The certificate of service on the notice of appeal indicates that it was sent to both the Administrator and the Board on the same day (February 3). The date stamp on the Board's copy indicates that it was received at the Board six days later, on February 9.

timely complaint.⁴ On May 28, 1993, the law judge granted the Administrator's request and issued an order terminating the proceeding. Applicant thereafter filed the subject application for attorney fees and expenses.⁵

Applicant does not contest the adequacy of the Administrator's evidence pertaining to the altitude deviation or deny that he violated section 91.123(a), as charged in the order of suspension.⁶ Rather, he has maintained throughout this EAJA proceeding that the Administrator's position in the enforcement action was unreasonable in law and in fact, and therefore not substantially justified, because: 1) the Administrator did not comply with our rule regarding the filing of the complaint; and 2) the Administrator's pursuit of this action was allegedly contrary to FAA Compliance/Enforcement Bulletin No. 86-1, which specifies that -- absent a near midair collision, a prior (within

⁴ The Administrator attributes this lapse to "clerical error," explaining that this case was one of over 100 case files that were transferred from the southern regional counsel's office to FAA headquarters in an effort to redistribute workload. The notice of appeal was apparently received by the regional counsel's office while the file was in transit and that office was unable to coordinate timely filing of the complaint.

⁵ Applicant's original application sought \$1,627.75 in fees and expenses. In supplemental filings he requested an additional \$878.11 and \$530.86 in fees and expenses, for a total request of \$3,036.72.

⁶ Indeed, the FAA's enforcement file (much of which was attached to the Administrator's opposition to the application) contains abundant evidence from which the Administrator could reasonably conclude that the altitude deviation occurred, and that it was not excusable by any legitimate emergency or other defense. Since applicant does not directly contest the violation, we need not review that evidence in detail.

the past 2 years) altitude deviation, or other "aggravating circumstances" -- computer detected altitude deviations of 500 feet or less "should normally be addressed by means of administrative action." (See Exhibit 1 attached to applicant's application for fees and expenses.)

The Administrator does not take issue with applicant's claim that he is a prevailing party within the meaning of the statute.

However, he disputes applicant's characterization of the time period after the missed complaint-filing deadline as an unreasonable "continued issuance" of the order of suspension, noting that the Administrator in fact withdrew the order rather than "continuing" its issuance by filing an untimely complaint. The Administrator further contests the allegation that he did not comply with his own enforcement bulletin, asserting that it was within his prosecutorial discretion to pursue enforcement action, even under the terms of that bulletin. Specifically, the Administrator notes that applicant's altitude deviation resulted in a loss of standard separation with another aircraft, and argues that this constituted an aggravating circumstance which justified his pursuit of legal enforcement action as opposed to the otherwise-recommended administrative action. Moreover, documents in the FAA's enforcement file, attached to the Administrator's answer to the EAJA application, reveal that prior to issuance of the order of suspension applicant declined the opportunity to participate in a remedial training program and be issued a letter of correction in lieu of legal enforcement

action.

The law judge found that the Administrator's failure to file a timely complaint, and his subsequent withdrawal of the order, did not render his pursuit of this action unreasonable. We agree. Applicant suggests that the Administrator was unreasonable in not immediately withdrawing his order upon missing the complaint-filing deadline, thus (in applicant's view) "forcing" applicant to file a motion to dismiss the case. Applicant points out that the Administrator did not withdraw the complaint until some two months after missing the deadline. Further, he asserts that even after receiving the motion to dismiss, counsel for the Administrator attempted to "plea bargain" with applicant, offering to withdraw the order if applicant would waive his right to recover EAJA fees.

Our case law indicates that a late-filed complaint is not necessarily fatal to an enforcement case, and that unless it is shown that the respondent's ability to defend against the charges was prejudiced by the delay, the lateness provides no grounds for dismissal in such a case. See Administrator v. Callender and Watkins, NTSB Order No. EA-3934 at 5, n. 5 (1993), and cases cited therein. There is no indication in this record that a two-month delay in the filing of the Administrator's complaint would have prejudiced the applicant's ability to defend against the charged violation.

Accordingly, because the Administrator could have made a reasonable argument that a late complaint should be accepted in

this case, his failure to withdraw the complaint sooner cannot be deemed unreasonable so as to render his action without substantial justification. The fact that applicant felt it necessary to file a motion to dismiss is not evidence of the Administrator's unreasonableness. Nor, in our judgment, did the Administrator's alleged attempt to "plea bargain" with applicant create any unfavorable inference as to the reasonableness of his pursuit of the action.⁷

Regarding the Administrator's alleged non-compliance with his enforcement bulletin, the law judge agreed with applicant's assertion that the Administrator's original offer of remedial training in lieu of legal enforcement belied his subsequent claim that legal enforcement was justified because aggravated circumstances existed in this case. Nonetheless, the law judge found, and we agree, that in light of applicant's refusal to participate in the proffered remedial training,⁸ the Administrator's subsequent issuance of the order of suspension

⁷ We agree with the Administrator that the alleged comments are in the nature of settlement negotiations, and therefore should not normally be considered by the Board. Nonetheless, because these references do not prejudice the Administrator's case we will not strike them from the record. See Administrator v. Alaska Island Air, Inc., NTSB Order No. EA-3633 at 2 (1992).

⁸ In his appeal brief, applicant denies that he refused the offer of remedial training, asserting that the offer was simply withdrawn after applicant said he wanted to seek legal counsel. However, this unsupported assertion is insufficient to rebut the written statements of two separate FAA inspectors indicated that applicant told each of them that he did not wish to participate in the offered remedial training, and that he would instead attempt to "beat" the violation in court. (See Exhibits 6 and 10 attached to the Administrator's Answer in Opposition to Application for Attorney Fees.)

and his pursuit of the enforcement action was not contrary to the guidance in Enforcement Bulletin No. 86-1. We think the policy articulated therein of "normally" addressing certain altitude deviations with administrative action, as opposed to legal enforcement action, can fairly be read as resting on the implicit assumption that in the "normal" case the violator will accept and accede to the terms of the chosen administrative action, a condition that was not fulfilled in this case. Accordingly, we need not address the Administrator's alternate argument, rejected by the law judge, that the loss of standard separation constituted an aggravating factor in this case, thereby justifying legal enforcement action under the explicit terms of the bulletin.

ACCORDINGLY, IT IS ORDERED THAT:

1. Applicant's appeal is denied; and
2. The denial of the application for fees and expenses is affirmed.

HALL, Acting Chairman, LAUBER, HAMMERSCHMIDT and VOGT, Members of the Board, concurred in the above opinion and order.